

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. DAR - _____

Appeals Court

Appeals Court No.:

2020-P-1258

JARRETT MCGILLOWAY, and others,

Plaintiffs / Appellants

v.

SAFETY INSURANCE COMPANY, and another,

Defendants / Appellees

On Appeal from Judgment of the Trial Court
Department of the Suffolk Superior Court

**APPELLANTS' UNOPPOSED APPLICATION FOR DIRECT
APPELLATE REVIEW BY THE SUPREME JUDICIAL COURT**

Michael C. Forrest, Esq.
BBO# 681401
David J. Relethford, Esq.
BBO# 691223
FORREST, LaMOTHE, MAZOW,
McCULLOUGH, YASI & YASI, P.C.
Two Salem Green
Salem, MA 01970
(617)231-7829

I. REQUEST FOR DIRECT APPELLATE REVIEW

Appellants, Jarrett McGilloway, Linda Estrella, and Adam Ercolini (collectively "Appellants"), pursuant to Mass. Appellate Procedure Rule 11(b), hereby request direct appellate review by the Supreme Judicial Court ("SJC") of the narrow issues set forth herein. The Appellees do not oppose this application.

The questions presented are appropriate for direct appellate review as they are matters of first impression wherein the public interest is paramount. See, Mass. R. App. P. 11.

The precise questions of law that are presented by this appeal are whether:

- (1) Inherent diminution in value damages ("DIV") are recoverable by a third-party claimant against an at-fault tortfeasor under Massachusetts common-law; and
- (2) Part 4 of the Standard Massachusetts Automobile Policy affords coverage for inherent diminution in value damages (up to the applicable policy limit) to a third-party tort claimant.

A copy of the Trial Court's order on appeal is ("Order") is appended hereto as **Exhibit A**. Copies of the

Docket entries for the consolidated cases has been appended to this application as **Exhibit B** (McGilloway Docket; and **Exhibit C** (Ercolini Docket).

In the matter *sub judice*, the issues of state law relevant to this appeal should be heard by the Commonwealth's high Court because: (1) there is a strong public interest in determining the remedies afforded to third-party tort victims and the duties of an insurer under the Standard Massachusetts Automobile Policy; (2) these are novel questions of first impression; and (3) the Commonwealth's final determination will simplify and expedite appellate procedure avoiding potentially inconsistent lower court decisions in similar pending cases.

II. STATEMENT OF PRIOR PROCEEDINGS

On June 30, 2017, Appellant McGilloway filed the present action against Safety Insurance Company ("Safety") in Suffolk County Superior Court. Thereafter, on April 23, 2018, the case was removed to the Business Litigation Session.

On June 20, 2018, Appellants McGilloway and Estrella filed their Second Amended Complaint, which alleged additional claims for violations of M.G.L. c.

93A and included Estrella a putative class representative. See, McGilloway Docket, No. 10.

On August 23, 2018, Appellants McGilloway and Estrella filed their Motion for Class Certification in the action against Safety; however, the Court deferred action on the Motion. See, McGilloway Docket No. 13.

On August 30, 2018, Safety filed a Motion to Dismiss, which motion was denied on October 3, 2018. See, McGilloway Docket No. 14.

On May 29, 2018, Appellant Ercolini filed the present action against Commerce Insurance Company ("Commerce") in Suffolk County Superior Court. See, Ercolini Docket No. 1.

On November 2, 2018, the Court consolidated these actions for all pre-trial purposes. See, McGilloway Docket No. 17; and Ercolini Docket No. 15.

On December 13, 2019, Appellants filed their *Motion for Partial Summary Judgment*, seeking an order on the issues of law and alleged liability of the Appellee insurers raised by the action. See, Ercolini Docket No. 22. On December 13, 2019, Commerce filed its *Motion for Summary Judgment* and its *Motion to Impound* certain materials. See, McGilloway Docket Nos. 19; and 20. The

Court allowed Commerce's *Motion to Impound* on the same day. Id. at 19.

On December 16, 2019 Safety filed its *Motion for Summary Judgment*. See, McGilloway Docket No. 20.

On March 10, 2020, after oral argument, the trial court rendered its decision on the Parties respective motions for summary judgment. See, Ercolini Docket Nos. 21; and 22; and McGilloway Docket Nos. 24; and 25.

In its order, the trial court found that neither Massachusetts Common-Law, nor the Standard Automobile Policy, require the payment of inherent diminution in value damages to a third-party claimant. Id.

On March 27, 2020, Appellants timely filed their *Notice of Appeal*.

III. SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL

A. Claims Against Safety

a. McGilloway Claim

On August 20, 2016, McGilloway's Vehicle was involved in a collision caused by an employee of Ultimate Parking LLC. See, McGilloway Docket No. 5, ¶ 3. As a result of the collision, McGilloway's vehicle sustained severe damage. At the time of the collision, Ultimate Parking LLC was insured under a Standard Massachusetts Automobile Policy issued by Safety Insurance Company

("Safety"), which policy included indemnity benefits available to pay for third-party property damage. See, McGilloway Docket No. 5, at ¶ 5.

Safety determined its insured was liable for the subject collision.

Thereafter, McGilloway made a direct third-party demand for payment to Safety in relation to his property damage claim against the at fault party; Safety's insured. In response, Safety made a partial payment of \$5,717.78 for McGilloway's property damage claim but refused to compensate McGilloway for the DIV his vehicle suffered through the tortious conduct of Safety's insured. See, McGilloway Docket No. 5, ¶ 24.

On, June 26, 2017, McGilloway, through Counsel, sent Safety M.G.L. c. 93A, § 9(3) class-wide demand seeking payment of McGilloway's and similarly situated third-party claimants' DIV.

Safety responded to McGilloway's class wide M.G.L. c. 93A Demand and expressly refused to provide any relief to the putative class.

b. Estrella Claim

On February 15, 2017, Estrella's Vehicle was involved in a collision caused by Nicholas Farmer. As a result of the collision, Estrella's Vehicle sustained

severe damage. At the time of the collision, Farmer was insured under a Policy of insurance issued by Safety which policy included indemnity benefits available to pay for third-party property damage. See, McGilloway Docket No. 5, at ¶ 5.

On, December 11, 2017, Estrella, through Counsel, sent Safety M.G.L. c. 93A, § 9(3) class-wide demands seeking payment of Estrella and similarly situated third-party claimants' DIV; however, Safety expressly refused to provide any relief to the putative class.

B. Claims Against Commerce.

On November 18, 2016, Ercolini's Vehicle was involved in a collision caused by Commerce's insured, Christopher Michael Keohan ("Keohan"). See, Ercolini Docket No. 5, ¶ 6. As a result of the collision, Ercolini's Vehicle sustained severe damage. At the time of the collision, Keohan was insured under a policy of insurance issued by Commerce which policy included indemnity benefits available to pay for third-party property damage. See, Ercolini Docket No. 5, at ¶ 6. Thereafter, Ercolini presented a third-party demand for payment of his remaining property damage; however, Commerce only made a payment of \$6,696.67 for Ercolini's property damage claim as it refused to compensate

Ercolini for his DIV losses.

**IV. STATEMENT OF ISSUES OF LAW RAISED BY APPEAL,
TOGETHER WITH A STATEMENT INDICATING WHETHER THE
ISSUES WERE RAISED AND PROPERLY PRESERVED**

The questions presented by way of this appeal represent matters of first impression as to the duty of an insurer to make Part 4 payments for DIV under the Standard Massachusetts Automobile Policy.

Appellants submit that direct appellate review is warranted on the following issues:

1. Whether a third-party tort victim is entitled to be made whole and as such recover inherent diminution in value damages from an at-fault tortfeasor under Massachusetts common-law; and
 2. Whether Part 4 of the Standard Massachusetts Automobile Policy affords coverage for inherent diminution in value damages (up to the applicable policy limit) to a third-party tort claimant,
- Appellants preserved these issues by
- Appellants properly raised these issues on cross motions for summary judgment, which decision attached here as **Exhibit A**, is being appealed.

V. BRIEF ARGUMENT IN SUPPORT OF APPELLANT'S POSITION

The Suffolk Superior Court's decision on the cross-motions for Summary Judgment, determined that a tort

victim was not entitled to post-repair diminution in value damages. See, Exhibit A, p. 7.

The decision of the trial court departs from the well understood concept that a tort victim should be made whole. That is, the Court's ruling allows tortfeasors (and by extension their insurers) to not compensate tort victims for their full damages. Instead the tort victim, who has no liability, incurs the costs associated with their depreciated vehicle. This unjustly allows the tortfeasor a windfall, leaving the tort victim to foot the bill.

Massachusetts common-law recognizes that a tort victim is entitled to "... *the difference between the fair market value of the property prior to the loss and its fair market value after the loss caused by the tortfeasor[]*", or alternatively, that they are entitled to be made whole. Ramirez v. Commerce Ins. Co., 91 Mass. App. Ct. 144, review denied, 478 Mass. 1102 (2017)., citing, Massachusetts Port Authy. v. Sciaba Constr. Corp., 54 Mass.App.Ct. 509, 513-514 (2002) (emphasis added).

Inherent Diminution in Value is the widely understood concept that a vehicle that has been involved in a collision (suffering physical damage) is ultimately

worth less (regardless of repair) in the resale market. DIV has been recognized in the context of third-party property damage claims in the majority of jurisdictions throughout the nation.¹

DIV as a recoverable damage is also expressly recognized by the *Restatement (Second) of Torts*. See, *Restatement (Second) of Torts* § 928 (1979) (“When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for: (a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs.”) (emphasis added).

Moreover, M.G.L. c. 90, § 340 (the statute that controls the terms of the Policy), and the Policy itself,

¹ See e.g., Farmers Ins. Co. v. R.B.L. Investment, Inc., 675 P.2d 1381 (Ariz. 1983); Trujillo v. Wilson, 189 P.2d 147 (Colo. 1948); Airborne v. Denver Air Center, 832 P.2d 1086 (Colo. App. 1992); McHale v. Farm Bureau Mut. Ins. Co., 409 So.2d 238 (Fla. 1982); Trailmobile Division v. Higgs, 297 N.E.2d 598 (Ill. 1973); Wiese-GMC v. Wells, 626 N.E.2d 595 (Ind. 1993); Halferty v. Hawkeye Dodge, 158 N.W.2d 750 (Iowa 1968); Broadie v. Randall, 216 P. 1103 (Kan. 1923); Orillac v. Solomon, 765 So.2d 1185 (La. 2000); Fred Frederick v. Krause, 277 A.2d 464 (Md. 1971); Hubbard v. Albuquerque, 958 P.2d 111 (N.M. 1998); Copadis v. Haymond, 94 N.H. 103 (N.H. 1946); Rosenfield v. Choberka, 529 N.Y.S.2d 455 (N.Y. 1988); EAM Advertising Agency v. Helies, 954 P.2d 812 (Or. App. 1998); Newman v. Brown, 90 S.E.2d 649 (S.C. 1955); and Averett v. Shircliff, 237 S.E.2d 92 (Va. 1977).

both entitle a third-party claimant to the full compensation necessary to be made whole for the actions of the insured tortfeasor. See, Id.; and Ramirez, 91 Mass. App. Ct. at 147 (recognizing that a third-party automobile claimant has the right to be made whole under Part 4 of the Policy).

The Superior Court's decision was in error because the court failed to: (1) appreciate the distinction between remedies for damaged real property versus damaged personal property; (2) recognize the distinction between pre-repair diminution in value, and post-repair Inherent Diminution in Value (the matter before the Court); (3) account for Massachusetts' courts adherence to the Restatements; (4) recognize that the law of real property itself allows for the recovery of post repair DIV damages;² and (5) recognize that DIV damages are covered by Part 4 of the Policy.

1. DIV is Recoverable in Tort

A party who suffers injury that is proximately caused by the negligence of another is entitled to be

² See, Medford Hous. Auth. v. Marinucci Bros. & Co., 354 Mass. 699, 703 (1968) (With respect to harm to a home, "[t]he measure of damages is the diminution in market value and the cost of repairs is evidence on the issue.") (emphasis added); Childs v. O'Leary, 174 Mass. 111 (1899); and Bisson v. Eck, 40 Mass. App. Ct. 942, 943 (1996).

fairly compensated for his or her loss; this principle underlies the rules for recovery of negligent damage to real property, as well as personal property. See, Johnson Insulation, 425 Mass. at 666; and Smith, 462 Mass. at 375.

The Superior Court's holding, rests on real property cases and therefore misapplies Massachusetts law by conflating real property and personal property remedies. See, Exhibit A, p. 6, 7.

Because real property is often unique, no fixed formula for measuring damages has been derived. Massachusetts Port Auth. v. Sciaba Const. Corp., 54 Mass. App. Ct. 509, 513 (2002).

As the SJC opined, "[t]he body of case law that has developed in this area reflects that upholding the principle of fair and reasonable compensation *requires flexibility* in measuring the appropriate damages so as to account for the unusual or specialized character *of real property* and any special value it may hold for the particular owner." Massachusetts Port Auth., 54 Mass. App. Ct. at 515 (emphasis added).

With respect to personal property however; as is the case here, it is well understood that a tort victim has a right to be made whole for harm to their personal

property, especially where there is a ready market available assess such harm. Ramirez, 91 Mass. App. Ct. at 147; Smith, 462 Mass. at 375; and G.E. Lothrop, 290 Mass. at 194.

Unlike real property, chattels have both a ready market and the measure of the loss suffered is readily calculable.

As such, it would be improper to impose the unique remedies (necessary in the context of harm to real property) to limit recoverable damage to a chattel (an automobile).

Moreover, Massachusetts Courts have already set the compensatory remedies available for harm to personal property. See e.g., Ramirez, supra (right to be made whole); Smith, supra (same); Giles, supra; see also, *Restatement (Second) of Torts*, § 903 (1979) ("Compensatory Damages—are damages awarded to a person as compensation, indemnity or restitution for harm sustained by him").

Further, the Superior Court also mistakenly conflated pre-repair DIV damage and post-repair DIV damage. That is, the DIV damage described in the real property cases it cites referred to the market value of the damaged land before repair occurred. See, **Exhibit A**,

p. 6-7. Conversely, in the present action, Appellants seek the cost of loss in market value they continue to suffer, *post repairs*.

Understood remedies for harm to real property and personal property have evolved in order to fairly, and fully, compensate tort victims.

2. Part 4 of the Policy Provides Coverage for Third-Party DIV Damage.

Part 4 of the Policy unambiguously permits a third-party to recover from the insurer amounts a third-party would be entitled to collect from an insured tortfeasor through judgment or settlement. R.A.0624("The damages we will pay are the amounts that person is legally entitled to collect for property damage through a court judgment or settlement."); see also, Ramirez, 91 Mass. App. Ct. at 147 ("Where a third party has incurred automobile damage due to a collision ..., part 4 of the policy requires the insurer to pay the amounts that person is legally entitled to collect for property damage through a court judgment or settlement...)(internal citation omitted). Said alternatively, an insurer is required (by Part 4 of the Policy)(once liability is established) to adjust and tender amounts to a third-party claimant to fully compensate him or her for amounts he/she would be

"entitled to collect for property damage through a court judgment or settlement."). R.A.0624. The insurer must make the third-party claimant whole. See, R.A.0624; M.G.L. c. 90, § 340; see also e.g., Ramirez, 91 Mass. App. Ct. at 147; and Restatement (Second) of Torts § 928 (1979).

A. Direct Appellate Review will determine the remedies of third-party automobile claimants and the duties of the insurer under the Massachusetts Standard Automobile Policy.

With respect to the available remedy for a third-party automobile claimant, the SJC and the Appeals Court have further unequivocally held that "[u]nder the common law of torts, at the time of an accident, an injured party accrues a right, albeit an inchoate one, 'to be made whole and compensated for' injuries wrongfully inflicted by a tortfeasor." Ramirez, citing, Smith v. Massachusetts Bay Transp. Auth., 462 Mass. 370, 375 (2012) ("Under the common law of torts, at the time of an accident, an injured party accrues a right... 'to be made whole and compensated for' injuries wrongfully inflicted by a tortfeasor.").

Appellants argue the SJC's final determination on this matter is necessary because the decision of the Trial Court will set the remedies of tort victims

involved in automobile collision claims, as well as, the extent of the coverage afforded by Part 4 of the Standard Massachusetts Automobile Policy.

The SJC should define tort claimants' rights and remedies and the insurer's responsibilities under Part 4 of the Massachusetts Standard Automobile Policy.

B. These are novel questions of first impression

The SJC concluded in Given v. Commerce Ins. Co., that DIV could not be recovered in contract under the Part 7 Collision Coverage of the Massachusetts Standard Automobile Policy. 440 Mass. 207, (2003). The SJC declined to opine on other contexts, such as tort recovery as those issues were not before it. Id. at 210-211 ("The issue before us is not whether, in some other context, diminution in market value would be an appropriate method by which to calculate monetary damages for some form of injury to property"). Id.

This issue of tort coverage for DIV under Part 4 of the Massachusetts Standard Automobile Policy has not been answered, and was specifically not answered in Given v. Commerce Ins. Co.

The Suffolk Superior Court issued a prophetic guess as to what the High Court would do with respect to remedies for damage to automobiles/personal property by

extrapolating a solution from a distinctly different *real property* analysis to reach its conclusions.

Appellants seek to bring this new question to the SJC for final determination to answer this novel question.

C. This determination will simplify and expedite appellate procedure.

Because this case involves novel questions of Massachusetts Common Law, as well as an interpretation of the Standard Massachusetts Automobile Policy, the issues presented herein are ripe for direct appellate review of the Massachusetts Supreme Court so as to avoid potentially inconsistent decisions in the Massachusetts Courts and make an efficient appeals process in accordance with the goals of direct appellate review. Tisei v. Bldg. Inspector of Marlborough, 3 Mass. App. Ct. 377, 378 (1975).

That is, the lower Court's decision creates a conflict as other courts of the Commonwealth have in fact held that in the context of damage to personal property, the common-law does allow for recovery of both the costs of repairs and inherent diminution in value damages; and further, that the common-law may allow for diminution in market value caused by purported stigma,

even in cases involving real property. See e.g., Bisson v. Eck, 40 Mass. App. Ct. 942, 943 (1996) ("We need not consider whether Massachusetts Common Law allows for an award of damages for a decrease in market value caused by the stigma associated with contamination from oil or hazardous materials. In the first instance, there is nothing in our case law which *precludes* such an award.").

Finally, direct appellate review of these issues will promote the efficient conduct related to other Massachusetts State litigation. There are presently actions concerning the same issues being addressed by the Massachusetts State Courts. See, Seaver et al. v. Commerce Insurance Company, Suffolk Sup. Ct., No. SUCV-1984-CV-02741; and Winn, et al. v. Arbella Mutual Ins. Co., Worcester Sup. Ct., No. SUCV-1985-CV-00961-C.

VI. CONCLUSION

This case shall determine whether tens of thousands of Massachusetts claimants will receive compensation as required by law for in consideration for the damage their vehicles have suffered. This is a novel question which has remained unanswered in the Commonwealth.

Accordingly, Appellant respectfully request that the SJC grant direct appellate review to address this critical issue.

Respectfully Submitted,
Appellants ,
By their Attorney,

/s/ Michael Forrest

DATED: 11.18.20

Michael C. Forrest, Esq.
BBO# 681401
FORREST, LaMOTHE, MAZOW,
McCULLOUGH, YASI & YASI, P.C.
Two Salem Green
Salem, MA 01970
(978) 745-7950

CERTIFICATE OF SERVICE

I, Michael C. Forrest, Esq., attorney for Appellants, hereby certify that I served two (2) copies of the attached Appellant's Application for Direct Appellate Review via First Class Mail, postage prepaid, to all parties of record this 18th day of November 2020.

/s/ Michael Forrest

Michael C. Forrest, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify, under the penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of direct appellate review applications, including, but not limited to:

- A. Rule 11(b) (applications for direct appellate review); and
- B. Rule 20 (form and length of briefs, appendices, and other documents);

This brief was written in Courier New, 12-point font,
and created on Microsoft Word (v. Office 365).

The number of non-excludable words contained in this
application for direct appellate review is 1,985.

/s/ Michael Forrest

Michael C. Forrest, Esq.

Exhibit A

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COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.

SUPERIOR COURT
1784CV02089-BLS2 ✓
1884CV01627-BLS2

JARRET MCGILLOWAY AND LINDA ESTRELLA, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

SAFETY INSURANCE COMPANY

ADAM ERCOLINI, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED

v.

THE COMMERCE INSURANCE COMPANY

**MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The plaintiffs suffered collision damage to their automobiles. The defendant insurers paid to repair the vehicles and restore them to their prior condition.

Plaintiffs claim that the defendant insurers are also obligated to pay for alleged "inherent diminished value" (or "IDV") because their vehicles were worth less after they were fully repaired than they had been before they were damaged, due solely to the fact the vehicles had been in a collision. Ms. Estrella and Mr. Ercolini assert claims under Part 4 of the Massachusetts automobile insurance policy, which provides coverage for damage to property owned by someone other than the policy holder. Mr. McGilloway seeks to recover under a Garagekeeper's Coverage Endorsement, because his vehicle was damaged while being driven by a parking facility attendant.

The insurers say they are not required to reimburse for IDV under either policy.

The Court concludes that neither policy requires an insurer to pay for any remaining Inherent Diminished Value in addition to paying the cost to fully repair an automobile that was damaged in a collision. It follows that neither insurer violated G.L. c. 176D or G.L. c. 93A by denying or improperly evaluating or responding to Plaintiffs' additional claims. The Court will therefore ALLOW the motions by the insurers for summary judgment in their favor and DENY Plaintiffs' cross-motion for summary judgment. A declaratory judgment will enter in Defendants' favor.

notice
sent

03/10/20

PLB

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(MD)

1. Undisputed Material Facts. The summary judgment record establishes that the following facts are true.

1.1. Mr. McGilloway's Claim. In August 2016, Jarrett McGilloway parked his 2013 Jeep Grand Cherokee at a facility owned and operated by Ultimate Parking, LLC. An employee of Ultimate Parking drove McGilloway's Jeep and collided with another vehicle. The Jeep sustained physical damage.

At that time, Ultimate was insured by Safety Insurance Company under a commercial auto policy. The policy includes a Garagekeeper's Coverage Endorsement under which Safety agreed to "pay all sums" that Ultimate "must pay as damages for 'loss'" to a customer's automobile caused by any collision of the vehicle with another object. The endorsement defined "loss" to mean "direct and accidental loss or damage and includes any resulting loss of use."

After McGilloway reported the incident, Safety determined that Ultimate was liable for the collision, appraised the damage to the Jeep, and paid the full cost (roughly \$5,700) to repair the vehicle and return it to its prior condition. It did not pay any additional amount to reimburse McGilloway for any IDV damages. McGilloway asked Safety to reimburse him for the diminished value of his vehicle due to the collision, which McGilloway estimated to be at least \$4,425. Safety first offered to pay an additional \$328.77; it later offered to pay \$1,125 to settle McGilloway's IDV claim. McGilloway did not accept these offers.

1.2. Ms. Estrella's Claim. In February 2017, Linda Estrella's 2015 Chevrolet Impala was damaged in a collision with motor vehicle operated by Nicholas Farmer. Both Estrella and Farmer were insured under a personal auto policy issued by Safety. Estrella's policy included optional Part 7 collision coverage for damage to her own vehicle. Farmer's policy provided the following with regard to liability for collision damage to someone else's property:

Part 4. Damage to Someone Else's Property: Under this Part, we will pay damages to someone else whose auto or other property is damaged in an accident. The damages we will pay are the amounts that person is legally entitled to collect for property damage through a court judgment or settlement. We will pay only if you or a household member is legally responsible for the accident.

After Estrella reported the collision, Safety paid the full cost (roughly \$8,700) to repair her vehicle. It did so under Estralla's collision coverage. Later on, counsel for Estrella demanded that Safety pay an additional \$3,100 under

Farmer's policy for alleged IDV damages. Safety offered to pay \$1,200 to settle Estrella's IDV claim. Estrella did not accept that offer.

1.3. Mr. Ercolini's Claim. In November 2018, Adam Ercolini was driving his 2010 Honda Accord. He was involved in a collision with a vehicle driven by Michael Keohan, who was insured under a Massachusetts automobile insurance policy issued by The Commerce Insurance Company.

For purposes of adjusting Ercolini's claim, Commerce considered Keohan to be legally responsible for the collision. Part 4 of Ercolini's policy provided the same third-party collision damage coverage that is quoted above.

Commerce paid the cost of repairing Ercolini's vehicle in full. The repairs restored Ercolini's vehicle to its pre-industry condition and to industry standards. Thereafter, Ercolini demanded that Commerce pay an additional \$3,624 to \$4,450 for alleged IDV damages. Commerce has not done so.

2. Analysis. The complaints in these consolidated actions assert the same sets of claims against Safety and Commerce. Count I is a claim for breach of contract under the relevant insurance policy. Count II is a claim that the insurer's failure to pay the claim IDV damages is an unfair practice that violates G.L. c. 93A. Counts III to VI are claims under c. 93A that the insurers' claims handling practices violated various provisions of G.L. c. 176D, § 3(9). And Count VII is a claim for declaratory relief under G.L. c. 231A.

Defendants seek summary judgment in their favor on all claims. Plaintiffs seek partial summary judgment in their favor on the claim for declaratory relief. They do not seek summary judgment on all claims because class certification has not yet been decided.

The parties agree that IDV is the concept that a vehicle's fair market value may be less following a collision and repairs, and that it equals the difference between the resale market value of a motor vehicle immediately before a collision and the vehicle's market value after a collision and subsequent repairs.

They dispute whether and when a motor vehicle that has been damaged in a collision and then is fully repaired may be worth less than it was before the

collision, and thus have an Inherent Diminished Value.¹ But this dispute is not material in deciding the cross-motions for summary judgment.

Assuming that the vehicles owned by the three named plaintiffs suffered IDV that their insurers refused to cover, Safety and Commerce are still entitled to judgment in their favor as a matter of law.

2.1. Contract Claims. Neither Safety Insurance nor Commerce Insurance has a contractual obligation under the automobile insurance policy provisions at issue here to pay for any Inherent Diminished Value that remains after the insurer has paid to repair a vehicle damaged in a collision and the vehicle is restored to its pre-collision condition. The Court agrees with the thoughtful analysis of these issues and the holding by Judge Saylor in *Martins v. Vermont Mut. Ins. Co.*, 411 F.Supp.3d 166 (D.Mass. 2019).

2.1.1. The *Givens* Decision. The Supreme Judicial Court has held that automobile insurers are not required to pay for Inherent Diminished Value when they provide first-party collision damage coverage under Part 7 of the standard Massachusetts automobile insurance policy. See *Given v. Commerce Ins. Co.*, 440 Mass. 207, 208–214 (2003).

But *Givens* does not control here; the policy provision at issue in that case is materially different than the provisions that govern Plaintiffs' claims.

The SJC held in *Givens* that Part 7 of the standard automobile insurance policy does not cover IDV for three reasons.

First, although the standard policy language provides that insurers will pay for "direct and accidental damage to [an] auto caused by a collision," it goes on to specify that diminution of value will be the measure of damage if the insured chooses not to have their automobile repaired. *Id.* at 209–211. Since the policy expressly provides that diminution in value is the measure of damage if the vehicle is not repaired, and "contains no reference to paying any form of damage other than the actual repair costs in the event that the vehicle is

¹ Safety admits that IDV may be suffered in some cases, but denies that every car damaged by collision has IDV after being fully repaired. Safety concedes that IDV may be quantifiable.

Commerce does not concede that vehicles that have been fully repaired after a collision ever suffer IDV. Nor does it concede that IDV, if it exists, is quantifiable. Commerce contends that sometimes a fully-repaired vehicle may be worth more after a collision than it was before.

repaired,” the SJC determined that insurers are not required by the policy language to pay IDV for vehicles that are repaired. *Id.* at 211–212.

Second, Part 7 of the standard policy included an express limitation on liability stating that the insurer will “never pay more than what it would cost to repair or replace the damaged vehicle.” *Id.* at 212. The SJC determined that, under this limitation, where an insurer has “paid for the full cost of repairing the vehicle,” it is “not obligated to pay anything more under any theory,” including a diminution in value theory. *Id.* Even if the policy language was otherwise ambiguous, this limit on liability is not. *Id.*

Third, the SJC determined that this interpretation of the policy language was “reinforced by ... the relevant statutes and regulations.” *Id.* at 213. The standard auto insurance policy must be construed “in a manner consistent with the statutory and regulatory scheme that governs such policies.” *Id.* at 209. The statute requiring automobile insurers to offer optional collision coverage (G.L. c. 90, § 34O), and the statute and regulations governing auto damage appraisal and repair (G.L. c. 26, § 8G; 211 Code Mass. Regs. §§ 133.00; and 212 Code Mass. Regs. §§ 2.00) say nothing about IDV. *Id.* The SJC concluded that “the absence of any reference to inherent diminished value in this extensive regulatory scheme” makes it “apparent that the Commissioner of Insurance ... does not interpret the standard policy’s collision coverage to encompass compensation for inherent diminished value in addition to compensation for the cost of repairs.” *Id.* at 214.

Although this third point is relevant here, the first two are not. The policy language at issue in this case is materially different than the first-party collision coverage that was construed by the SJC. Neither of the policy provisions implicated here specifies that diminution in value damages will only be covered if the owner chooses not to have their vehicle repaired. And neither provision states that the insurer’s liability for collision damage is capped at and will not exceed the full cost of repairing the vehicle.

Since the policy provisions implicated by the named Plaintiffs’ claims do not include the substantive language in Part 7 that was determinative in *Givens*, that decision does not resolve this case.

2.1.2. Construing the Policy Language. So let’s turn to the relevant language in the Safety and Commerce insurance policies. Part 4 of the standard automobile policy says that Safety and Commerce will pay for collision damage to

someone else's property equal to the amount that the third-party "is legally entitled to collect for property damage through a court judgment." Similarly, the garagekeeper's endorsement says that Safety will pay for collision damages to a customer's automobile equal to the amount that the operator of the parking facility "must pay as damages" to the customer.

Under these provisions, the scope of covered collision damages is determined by applicable tort law. Principles of tort law determine what amounts a vehicle owner is legally entitled to collect, or a parking facility operate must pay, for damaging someone else's vehicle in a collision.

At common law, the measure of compensation where real property has been damaged as a result of wrongful conduct depends on "whether 'the injury is permanent or 'reasonably curable by repairs.'" *Black v. Coastal Oil New England, Inc.*, 45 Mass. App. Ct. 461, 465 (1998), quoting *Belkus v. Brockton*, 282 Mass. 285, 287-288 (1933). Where the property cannot be restored to its prior condition, the appropriate measure of damages is the diminution in value, measured by the difference in fair market value before and after the injury. *Id.* But where the damage can be cured by repairs, "the expense of repairs, if less than the diminished market value, is the measure of recovery." *Black, supra*, quoting *Belkus, supra*; accord, e.g., *Guaranty-First Trust Co. v. Textron, Inc.* 416 Mass. 332, 336 (1993).

Under Massachusetts law, these are mutually exclusive theories of damages; a property owner is not entitled to recover the cost of repairs to restore the property to its previous condition, but then recover additional sums on the theory that the restored property has diminished in value because of the temporary injury. "The cost of repairs is the outlay necessary to restore property to its preinjury condition; in undertaking a repair, the injured party substitutes one measure of damages, a cash outlay, for another measure, the diminution in the property's value occasioned by the injury." *Commonwealth v. Johnson Insulation*, 425 Mass. 650, 666 (1997); see also, e.g., *Clean Harbors Environmental Services, Inc. v. Boston Basement Technologies, Inc.*, 75 Mass. App. Ct. 709, 714-715 (2009).

This rule applies with full force to personal property such as automobiles. Where (for example) some piece of equipment, a vessel, or a vehicle has been damaged by wrongful conduct "and the plaintiff successfully repairs the property, recovery may not be had both for repairs and the difference in value of the property." *Automated Donut Systems, Inc. v. Consolidated Rail Corp.*,

12 Mass. App. Ct. 326, 334 (1981) (equipment damaged in shipping). Plaintiffs' assertion that the damages rule articulated and applied in *Belkus* and its progeny does not apply to personal property is unavailing.

The rule is different where it is impossible to restore damaged personal property to its previous condition. Where a vessel or some other personal property is damaged by a tortfeasor, and the property can be repaired to some extent but cannot be restored to its prior condition, the owner is entitled to recover both the repair costs and the residual diminution in value. See *Giles v. Eagle Ins. Co.*, 43 Mass. (2 Metcalf) 140, 145–146 (1840).

But where, as here, damaged property is successfully repaired and returned to its previous condition, the only damages recoverable at tort are for the cost of repair. See *Johnson Insulation, supra*; *Automated Donut, supra*.

It follows that neither Safety nor Commerce has any obligation to pay Plaintiffs for any Inherent Diminished Value that may remain after their damaged vehicles were fully repaired and restored to their prior condition. As discussed above, where damaged property has been fully repaired, and the responsible party has paid the full repair costs, under Massachusetts law the property owner is not entitled to collect and the responsible party is not obligated to pay any additional amount for residual diminution of value. Therefore, unless and until the appellate courts change this rule, the policy language at issue here does not give the named Plaintiffs any right to recover for alleged IDV damages in addition to recovering the full cost to repair their vehicles.

2.1.3. The Underlying Regulatory Scheme. This reading of the Part 4 third-party property damage provision and the garagekeeper's endorsement is reinforced by regulations adopted by the Commissioner of Insurance to govern automobile damage appraisal and repair, just as in *Givens*.

By regulation, an appraiser must document all physical damage caused by a collision, but is not required to do anything to compare the value of the vehicle before the collision with its value once it is fully repaired. See 212 Code Mass. Regs. § 2.04(1)(e). Similarly, by regulation a damaged vehicle is a total loss if the salvage value of the damaged vehicle plus the cost to fully repair the vehicle exceeds the actual cash value of the vehicle immediately before the collision, without taking into account any IDV that may remain after the vehicle is fully repaired. See 211 Code Mass. Regs. § 133.05.

The absence of any reference to IDV in this regulatory scheme indicates that the Commissioner of Insurance does not interpret part 4 of the standard automobile insurance policy as providing coverage for IDV where a damaged vehicle can be fully repaired. See *Givens*, 440 Mass. at 214. Since the Commissioner decided what the terms of the standard policy would be, the Commissioner's express or implied interpretation of the policy language is entitled to deference. *Id.* at 214 & n.8.

2.2. Chapter 93A Claims. Given the Court's conclusion that Safety and Commerce had no contractual obligation to pay Plaintiffs for their alleged Inherent Diminished Value damages, it follows that Defendants are entitled to judgment in their favor on all five claims under G.L. c. 93A.

The two claims alleging that Defendants' failure to pay the alleged IDV damages violated c. 93A both fail as a matter of law. As to Count V, since Safety and Commerce have no liability to Plaintiffs for IDV damages, their refusal to pay those amounts does not constitute a failure to make a prompt and fair settlement of claims as to which "liability has become reasonably clear" and thus did not violate G.L. c. 176D, § 3(9)(f).² Count II fails for much the same reason. Since Defendants have no obligation to pay the claimed IDV damages, their failure to do so was neither unfair nor deceptive.³

Similarly, since Safety and Commerce have no obligation to pay IDV damages, the claims in counts III and VI that they violated G.L. c. 176D, § 3(9)(c) & (d) by not adopting reasonable standards for paying such damages and not conducting a reasonable investigation fail as well. See *Gurnack v. John Hancock Mut. Life Ins. Co.*, 406 Mass. 748, 753 n.5 (1990) (inadequate investigation does

² This claim would fail even if Plaintiffs had a viable claim for breach of contract. Since neither the Commissioner of Insurance nor any Massachusetts court has ever held that the policy provisions at issue in this case provide coverage for IDV, it necessarily follows that the alleged liability has never been reasonably clear. "A plausible, reasoned legal position" taken by an insurer in denying coverage does not violate c. 176D even if it "may ultimately turn out to be mistaken." *Guity v. Commerce Ins. Co.*, 36 Mass. App. Ct. 339, 343-344 (1995); accord *Phoenix Ins. Co. v. Churchwell*, 57 Mass. App. Ct. 612, 616-617 (2003) (affirming grant of summary judgment on this ground); *White v. American Cas. Ins. Co.*, 53 Mass. App. Ct. 66, 73-74 (2001) (same).

³ This claim would also fail even if Plaintiffs had a viable contract claim. "A good faith dispute as to whether money is owed is not actionable under G.L. c. 93A." *Northeast Line Const. Corp. v. J.E. Guertin Co.*, 80 Mass. App. Ct. 646, 654 (2011).

not give rise to liability if claimant is not harmed); *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 678 (1983) (affirming summary judgment for insurer on this ground).

And count VI fails—even assuming that there is a live issue as to whether Safety or Commerce complied with G.L. c. 176D, § 3(9)(n) by providing a timely explanation for not paying IDV damages—because a delay in responding to an insurance claim is not unreasonable if it does not prejudice the claimant in any way. See *Doe v. Liberty Mut. Ins. Co.*, 423 Mass. 366, 372 (1996). Or, to put the point slightly differently, a violation of c. 176D does not give rise to a claim under c. 93A where, as in this case, the plaintiff did not suffer any harm as a result of the violation. See *Alan Corp. v. International Surplus Lines Ins. Co.*, 22 F.3d 339, 343 (1st Cir. 1994) (affirming summary judgment for insurer on this ground).

“[T]he Legislature, in enacting and amending G.L. c. 93A, § 9, did not intend to confer on plaintiffs who have suffered no harm the right to receive a nominal damage award which will in turn entitle them to a sometimes significant attorney’s fee recovery.” *Aspinall v. Philip Morris Cos. Inc.*, 442 Mass. 381, 401 (2004), quoting *Lord v. Commercial Union Ins. Co.*, 60 Mass. App. Ct. 309, 321–322 (2004).

2.3. Declaratory Judgment Claims. Finally, since Plaintiffs have asserted a claims for declaratory relief, the Court must declare the rights of the parties even though it is granting summary judgment in favor of the Defendants. See, e.g., *Berkshire Mut. Ins. Co. v. Burbank*, 422 Mass. 659, 660 n.2 (1996); *Molly A. v. Commissioner of Dept. of Mental Ret.*, 69 Mass. App. Ct. 267, 288–289, rev. denied, 449 Mass. 1111 (2007).

Given the rulings above, the appropriate declaration of rights is a judgment declaring that, under the circumstances of this case, neither Part 4 of the standard Massachusetts automobile insurance policy nor the Garagekeeper’s Coverage Endorsement requires that Safety or Commerce pay for any Inherent Diminished Value of the repaired vehicle.

ORDER

The motions for summary filed by defendants Safety Insurance Company and The Commerce Insurance Company, are ALLOWED. Plaintiffs' motion for summary judgment is DENIED.

Final judgment shall enter in each case **ordering** that Plaintiff shall take nothing on their contract and G.L. c. 93A claims in counts I through VI and **declaring** that: (1) where a motor vehicle has been damaged in a collision and an insurer pays the cost to fully repair the vehicle, neither Part 4 of the standard Massachusetts automobile insurance policy nor the Garagekeeper's Coverage Endorsement used by Safety Insurance Company requires that the insurer pay for any Inherent Diminished Value of the repaired vehicle; and (2) as a result, neither Safety Insurance Company nor The Commerce Insurance Company has any contractual obligation to pay the Plaintiffs any amount for their alleged Inherent Diminished Value damages.



Kenneth W. Salinger

Justice of the Superior Court

10 March 2020

Exhibit B

1784CV02089 McGilloway, Jarrett et al vs. Safety Insurance Company

- Case Type:
- Contract / Business Cases
- Case Status:
- Open
- File Date
- 06/30/2017
- DCM Track:
- F - Fast Track
- Initiating Action:
- Other Contract Action
- Status Date:
- 03/11/2020
- Case Judge:
-
- Next Event:
-

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[Party](#)
[Event](#)
[Tickler](#)
[Docket](#)
[Disposition](#)

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
06/30/2017	Attorney appearance On this date Kevin John McCullough, Esq. added for Plaintiff Jarrett McGilloway		
06/30/2017	Case assigned to: DCM Track F - Fast Track was added on 06/30/2017		
06/30/2017	Original civil complaint filed. TRK	1	Image
06/30/2017	Civil action cover sheet filed. (\$2,000,000.00)	2	
06/30/2017	Demand for jury trial entered.		
08/09/2017	Amended: amended complaint filed by Jarrett McGilloway First & jury demand	3	Image
08/10/2017	Attorney appearance On this date Michael C Forrest, Esq. added for Plaintiff Jarrett McGilloway		
08/10/2017	Attorney appearance On this date John Richard Yasi, Esq. added for Plaintiff Jarrett McGilloway		
09/05/2017	Service Returned for Defendant Safety Insurance Company: Service made in hand;	4	Image
09/18/2017	Received from Defendant Safety Insurance Company: Answer to original complaint;	5	Image
09/19/2017	Attorney appearance On this date Peter L Bosse, Esq. added for Defendant Safety Insurance Company		
09/19/2017	Attorney appearance On this date Tanya Thu Austin, Esq. added for Defendant Safety Insurance Company		
03/05/2018	Plaintiff Jarrett McGilloway's Motion to amend the amended complaint (w/opposition)	6	
03/09/2018	The following form was generated: Notice to Appear Sent On: 03/09/2018 13:53:00		
04/23/2018	Event Result: Judge: Ullmann, Hon. Robert L The following event: Motion Hearing to Amend Complaint scheduled for 04/26/2018 02:00 PM has been resulted as follows: Result: Canceled Reason: Request of Plaintiff		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/23/2018	Defendant Safety Insurance Company's Assented to Motion to Transfer to Business Litigation Session	7	
05/01/2018	Endorsement on Motion to transfer to BLS (#7.0): ALLOWED Notice Sent: 04/30/2018 Dated: 04/26/2018 ALLOWED transferred to B.L.S. Judge: Ullmann, Hon. Robert L		Image
05/17/2018	General correspondence regarding Notice of Acceptance into Business Litigation Session "BLS2": Dated: 8/5/11/18 Notice sent 5/17/18 Judge: Sanders, Hon. Janet L	8	Image
05/18/2018	Civil action cover sheet mailed re: BLS		
05/23/2018	The following form was generated: Notice to Appear - BLS Sent On: 05/23/2018 11:37:52		
06/08/2018	Plaintiff Jarrett McGilloway's Motion to Amend the First Amended Complaint (without opposition)	9	
06/13/2018	Endorsement on Motion to Amend the First Amended Complaint (#9.0): ALLOWED without opposition. The Clerk's office shall docket the second amended complaint (dated 6/12/18) notice sent 6/13/18 Judge: Salinger, Hon. Kenneth W		Image
06/20/2018	Attorney appearance On this date Kevin John McCullough, Esq. added for Plaintiff Linda Estrella (as amended)		
06/20/2018	Attorney appearance On this date John Richard Yasi, Esq. added for Plaintiff Linda Estrella (as amended)		
06/20/2018	Attorney appearance On this date Michael C Forrest, Esq. added for Plaintiff Linda Estrella (as amended)		
06/20/2018	Amended: Second amended complaint filed by Jarrett McGilloway, Linda Estrella (as amended) and Jury demand (filed 6/12/18)	10	Image
07/19/2018	General correspondence regarding Letter to Judge Sanderes Request of plffs for, lv to exceed the twenty (20) page limitation Allowed Notice Sent 7/20/18	11	Image
08/02/2018	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 08/02/2018 02:00 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
08/02/2018	The following form was generated: Notice to Appear Sent On: 08/02/2018 14:34:56		
08/20/2018	Defendant's Notice of intent to file motion to dismiss Second Amended Complaint Applies To: Safety Insurance Company (Defendant)	12	
08/23/2018	Plaintiff Jarrett McGilloway, Linda Estrella (as amended)'s Motion for Class Certification (with opposition)	13	
08/24/2018	The following form was generated: Notice to Appear Sent On: 08/24/2018 11:20:21		
08/30/2018	Defendant Safety Insurance Company's Motion to dismiss Second Amended Complaint (w/opposition)	14	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/05/2018	Event Result:: Motion Hearing scheduled on: 09/11/2018 02:00 PM Has been: Not Held For the following reason: By Court prior to date Hon. Janet L Sanders, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
09/07/2018	Defendant Safety Insurance Company's Reply, Memorandum in Support of Motion to Dismiss Second Amended Complaint	15	
09/11/2018	Event Result:: Rule 12 Hearing scheduled on: 09/11/2018 11:00 AM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
10/01/2018	The following form was generated: Notice to Appear - BLS Sent On: 10/01/2018 14:19:27		
10/03/2018	MEMORANDUM & ORDER: On Defendant Safety Insurance Company's Motion to Dismiss Second Amended Complaint; Motion is DENIED without prejudice to revisiting these issues by way of a motion for summary judgment; Rule 16 Conference is scheduled for 11/16/2018; notice sent on 10/3/2018; Judge: Sanders, Hon. Janet L Judge: Sanders, Hon. Janet L	16	Image
10/03/2018	Endorsement on Motion for Class Classification; (#13.0): No Action Taken this Motion being premature; notice sent on 10/3/2018; Judge: Sanders, Hon. Janet L		Image
10/03/2018	Endorsement on Motion to dismiss Second Amended Complaint (#14.0): DENIED see Memorandum & Order Paper #(16); notice sent on 10/3/2018; Judge: Sanders, Hon. Janet L		Image
11/16/2018	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 11/16/2018 02:00 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
11/16/2018	The following form was generated: Notice to Appear - BLS Sent On: 11/16/2018 14:24:49		
11/20/2018	Defendant Safety Insurance Company's Submission of Proposed Scheduling Order: ADOPTED (this being the schedule set in Ercolini, with which this case is consolidated) Rule 16 conference 2/6/19 at 2:00pm (dated 11/16/18) notice sent 11/20/18 Judge: Sanders, Hon. Janet L	17	Image
01/24/2019	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 02/06/2019 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Kenneth W Salinger, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
01/24/2019	The following form was generated: Notice to Appear - BLS Sent On: 01/24/2019 10:48:46		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/10/2019	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 04/10/2019 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
04/10/2019	The following form was generated: Notice to Appear Sent On: 04/10/2019 14:24:06		
04/12/2019	ORDER: further scheduling order; (dated 4/10/19) notice sent 4/11/19	18	Image
07/10/2019	The following form was generated: Notice to Appear - BLS Sent On: 07/10/2019 09:39:05		
07/11/2019	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 07/11/2019 02:00 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
07/11/2019	Defendant Safety Insurance Company's Submission of Statement Regarding Stage One Discovery	19	Image
09/05/2019	Event Result:: Rule 56 Hearing scheduled on: 12/09/2019 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
09/05/2019	The following form was generated: Notice to Appear Sent On: 09/05/2019 09:42:51		
09/17/2019	Plaintiff Jarrett McGilloway's Joint Motion to Amend Tracking Order Deadlines: ALLOWED (dated 9/12/19) notice sent 9/13/19	20	Image
11/04/2019	Received from Defendant Safety Insurance Company: Answer to Second amended complaint;	21	Image
12/13/2019	Event Result:: Rule 56 Hearing scheduled on: 12/19/2019 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
12/13/2019	The following form was generated: Notice to Appear Sent On: 12/13/2019 12:29:10		
12/13/2019	Plaintiff Jarrett McGilloway, Linda Estrella (as amended)'s Motion for Partial Summary Judgment (with opposition)	22	Image
12/16/2019	Defendant Safety Insurance Company's Motion for Summary Judgment (with opposition)	23	Image
01/23/2020	Matter taken under advisement: Rule 56 Hearing scheduled on: 01/23/2020 02:00 PM Has been: Held - Under advisement Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
03/10/2020	Endorsement on Motion for Partial Summary Judgment (with opposition) (#22.0): DENIED see memorandum and order; notice sent 3/10/20		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/10/2020	Endorsement on Motion for summary judgment; (#23.0): ALLOWED see memorandum and order; notice sent 3/10/20		Image
03/10/2020	MEMORANDUM & ORDER: on cross-motions for summary judgment- defendants motions are ALLOWED and plaintiff's motion is DENIED; notice sent 3/10/20 Judge: Salinger, Hon. Kenneth W	24	Image
03/11/2020	FINAL JUGMENT It is Ordered and Adjudged The motions for Summary Judgment filed by defts Safety Insurance Company and The Commerce Insurance Company are ALLOWED Plffs motion for Summary Judgment is DENIED Final Judgment shall enter in each case Ordering that the plff shall take nothing on their contract and GL c93A claims in counts 1 through VI and declaring that(1) where a motor vehicle has been damaged in a collision and an insurer pays the costs to fully repair the vehicle n neither Part 4 of the standard Massachusetts automobile insurance policy nor the Garagekeeper's Coverage Endorsement used by Safety Insurance Company requires that th insurer pay for any Inherent Diminished Value of the repaired vehicle; and (2) as a result neither Safety Insurance Company nor the Commerce Insurance Company has any contractual obligation to apy the plffs any amount for their alleged Inherent Diminished Value damages entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	25	Image
03/27/2020	Notice of appeal filed. Notice sent 4/13/20 Applies To: McGilloway, Jarrett (Plaintiff); Estrella (as amended), Linda (Plaintiff)	26	Image
04/17/2020	Certification/Copy of Letter of transcript ordered from Court Reporter 01/23/2020 02:00 PM Rule 56 Hearing	27	Image
09/16/2020	Transcript of 1/23/2020 received. (Sent to the court via email on 4/14/2020)		
10/15/2020	Notice of assembly of record sent to Counsel		
10/15/2020	Notice to Clerk of the Appeals Court of Assembly of Record		
10/30/2020	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2020-P-1258) was entered in this Court on October 29, 2020.	28	Image

Exhibit C

1884CV01627 Adam Ercolini on behalf of Himself and all others similarly situated vs. Commerce Insurance Company

- Case Type:
- Contract / Business Cases
- Case Status:
- Open
- File Date
- 05/29/2018
- DCM Track:
- F - Fast Track
- Initiating Action:
- Other Contract Action
- Status Date:
- 03/11/2020
- Case Judge:
-
- Next Event:
-

[All Information](#)
[Party](#)
[Event](#)
[Tickler](#)
[Docket](#)
[Disposition](#)

Docket Information

Docket Date	<i>Docket Text</i>	File Ref Nbr.	<i>Image Avail.</i>
05/29/2018	Attorney appearance On this date Kevin John McCullough, Esq. added for Plaintiff Adam Ercolini		
05/29/2018	Attorney appearance On this date John Richard Yasi, Esq. added for Plaintiff Adam Ercolini		
05/29/2018	Attorney appearance On this date Michael C Forrest, Esq. added for Plaintiff Adam Ercolini		
05/29/2018	Case assigned to: DCM Track F - Fast Track was added on 05/29/2018		
05/29/2018	Case transferred from another court. Transferred from Middlesex Superior Court [1781CV03621] Accepted into the Suffolk Superior Civil Court Business Litigation Session "BLS1" (See P#7)		
05/29/2018	Complaint and Jury demand	1	Image
05/29/2018	Civil action cover sheet re: complaint (\$2,000,000.00)	2	
05/29/2018	Amended: amended complaint filed by Adam Ercolini on behalf of Himself and all others similarly situated and Jury Demand	3	Image
05/29/2018	Service Returned for Defendant Commerce Insurance Company: Service through person in charge / agent; in hand to Mary Bielak on 3/7/18	4	Image
05/29/2018	Received from Defendant Commerce Insurance Company: Answer to amended complaint and Jury demand (all issues)	5	Image
05/29/2018	Attorney appearance On this date Nelson G Apjohn, Esq. added for Defendant Commerce Insurance Company		
05/29/2018	Attorney appearance On this date Eric P Magnuson, Esq. added for Defendant Commerce Insurance Company		
05/29/2018	Attorney appearance On this date Melanie Woodward, Esq. added for Defendant Commerce Insurance Company		
05/29/2018	Defendant Commerce Insurance Company's Assented to Motion to Transfer Case to Business Litigation Session - ALLOWED Dated: 4/13/18 Judge: Green, Hon. Karen	6	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/29/2018	NOTICE OF ACCEPTANCE INTO BUSINESS LITIGATION SESSION "BLS1": Dated: 4/30/18 Judge: Sanders, Hon. Janet L	7	
05/29/2018	Copy of Docket Entries Received from Middlesex Superior Court	8	
05/29/2018	Attorney appearance On this date David Relethford, Esq. added for Plaintiff Adam Ercolini on behalf of Himself and all others similarly situated		
05/29/2018	Civil action cover sheet mailed re: BLS		
05/30/2018	NOTICE OF SUFFOLK BUSINESS LITIGATION SESSION NUMBER: This case has been transferred from Middlesex County into the Suffolk Business Litigation Session and has been assigned to the BLS1 Session. In the future, as shown above, all parties must include the new Suffolk County Docket Number and the initials "BLS1" at the end of the docket number on all filings. Dated: May 30, 2018 Notice sent 5/30/18	9	
07/30/2018	Defendant Commerce Insurance Company's Joint Motion for Entry of Stipulated Protective Order Applies To: Adam Ercolini on behalf of Himself and all others similarly situated (Plaintiff); Commerce Insurance Company (Defendant)	10	
07/30/2018	Attorney appearance On this date Joseph T Toomey, Esq. added for Defendant Commerce Insurance Company		
08/06/2018	Endorsement on Motion for Entry of Stipulated Protective Order (#10.0): ALLOWED (dated 8/3/18) notice sent 8/6/18 Judge: Davis, Hon. Brian A		Image
08/06/2018	ORDER: Stipulated Protective Order (see P#11) (dated 8/8/18) notice sent 8/6/18 Judge: Davis, Hon. Brian A	11	Image
08/13/2018	Defendant Commerce Insurance Company's Joint Motion to Transfer Case to BLS-2 and Request for Litigation Control Conference	12	
08/16/2018	The following form was generated: Notice to Appear - BLS Sent On: 08/16/2018 08:03:32		
08/17/2018	Endorsement on Motion to Transfer Case to BLS 2 and Request Litigation Control Conference (#12.0): ALLOWED (dated 8/15/18) notice sent 8/16/18 Judge: Davis, Hon. Brian A		Image
09/13/2018	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 09/13/2018 02:00 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
09/13/2018	The following form was generated: Notice to Appear - BLS Sent On: 09/13/2018 15:03:37		
09/17/2018	ORDER: tracking order Rule CN 2/6/2019 at 2:00PM to continue subsequent deadlines; notice sent on 9/17/2018; Judge: Sanders, Hon. Janet L	13	Image
10/12/2018	Defendant Commerce Insurance Company's Notice of Motion to consolidate cases for pre-trial purposes only;	14	Image
10/29/2018	Commerce Insurance Company's MOTION to consolidate with SUCV1784-cv-02089-BLS2 filed in the Suffolk County Civil. for Pretrial Purposes Only (w/opposition)	15	
11/02/2018	Endorsement on Motion to Consolidate Cases for Pre trial Purposes Only (#15.0): ALLOWED (dated 11/1/18) notice sent 11/2/18 Judge: Sanders, Hon. Janet L		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/20/2018	Plaintiff Adam Ercolini on behalf of Himself and all others similarly situated's Motion to compel discovery (w/opposition)	16	
01/03/2019	Endorsement on Motion to compel discovery; (#16.0): DENIED for reasons stated in opposition. In particular, this court has adopted a phased approach to discovery in this case. See tracking order dated 9/13/18. (dated 1/2/19 notice sent 1/3/19)		
01/24/2019	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 02/06/2019 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Kenneth W Salinger, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
01/24/2019	The following form was generated: Notice to Appear - BLS Sent On: 01/24/2019 10:50:23		
04/10/2019	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 04/10/2019 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
04/10/2019	The following form was generated: Notice to Appear Sent On: 04/10/2019 14:26:40		
06/11/2019	The following form was generated: Notice to Appear - BLS Sent On: 06/11/2019 14:57:18		
07/09/2019	Defendant Commerce Insurance Company's Statement of the Scope of Stage One Issue	17	Image
07/11/2019	Event Result:: BLS Rule 16 Litigation Control Conference scheduled on: 07/11/2019 02:00 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
09/05/2019	The following form was generated: Notice to Appear Sent On: 09/05/2019 09:39:40		
09/05/2019	Event Result:: Rule 56 Hearing scheduled on: 12/09/2019 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
12/09/2019	Defendant Commerce Insurance Company's Assented to Motion to Impound	18	Image
12/13/2019	Event Result:: Rule 56 Hearing scheduled on: 12/19/2019 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Janet L Sanders, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
12/13/2019	ORDER: Order on Assented to Motion to Impound See P#19) (dated 12/12/19) notice sent 12/19/19	19	Image
12/13/2019	Defendant Commerce Insurance Company's Motion for Summary Judgment (with opposition) (Certain Exhibits Impounded)	20	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/13/2019	The following form was generated: Notice to Appear Sent On: 12/13/2019 12:31:34		
12/13/2019	Docket Note: Redacted Version of Commerce Insurance Company's Motion Package for Summary Judgment submitted for file.		
12/13/2019	Endorsement on Motion to Impound (#18.0): ALLOWED (dated 12/12/19) notice sent 12/19/19		Image
01/23/2020	Matter taken under advisement: Rule 56 Hearing scheduled on: 01/23/2020 02:00 PM Has been: Held - Under advisement Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
03/10/2020	Endorsement on Motion for Summary Judgment (with opposition) (#20.0): ALLOWED see memorandum and order; notice sent 3/10/20		Image
03/10/2020	MEMORANDUM & ORDER: on cross-motions for summary judgment; defendants motions are ALLOWED and plaintiff's motion is DENIED notice sent 3/10/20 Judge: Salinger, Hon. Kenneth W	21	Image
03/11/2020	FINAL JUGMENT It is Ordered and Adjudged The motions for Summary Judgment filed by defts Safety Insurance Company and The Commerce Insurance Company are ALLOWED Pliffs motion for Summary Judgment is DENIED Final Judgment shall enter in each case Ordering that the plff shall take nothing on their contract and GL c93A claims in counts 1 through VI and declaring that(1) where a motor vehicle has been damaged in a collision and an insurer pays the costs to fully repair the vehicle n neither Part 4 of the standard Massachusetts automobile insurance policy nor the Garagekeeper's Coverage Endorsement used by Safety Insurance Company requires that th insurer pay for any Inherent Diminished Value of the repaired vehicle; and (2) as a result neither Safety Insurance Company nor the Commerce Insurance Company has any contractual obligation to pay the plffs any amount for their alleged Inherent Diminished Value damages entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	22	Image
03/27/2020	Notice of appeal filed. (See p#26 in 1784CV2089) Applies To: Adam Ercolini on behalf of Himself and all others similarly situated (Plaintiff)		
04/17/2020	Certification/Copy of Letter of transcript ordered from Court Reporter 01/23/2020 02:00 PM Rule 56 Hearing (See P#27 in 1784CV2089)		
09/16/2020	Transcript of 1/23/2020 received. (Sent to the court via email on 4/14/2020)		
10/15/2020	Notice of assembly of record sent to Counsel		
10/15/2020	Notice to Clerk of the Appeals Court of Assembly of Record		
10/30/2020	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2020-P-1258) was entered in this Court on October 29, 2020. (see p#28 in 1784cv2089)		Image